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No. 79-333

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

DARREN BOERCKEL,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

On Petition for Writ of Certiorari To The Illinois Appellate Court Fifth District

BRIEF FOR RESPONDENT IN OPPOSITION

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JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition. However, respondent submits that petitioner has failed to show reason for this Court to exercise its judicial discretion to grant this Petition for Writ of Certiorari.

QUESTIONS PRESENTED FOR REVIEW

1. Whether there was a Fourth Amendment violation since the petitioner voluntarily accompanied the police officer to the police station.

2. Whether petitioner's confession was sufficiently attenuated from the alleged illegal seizure so as to dissipate the taint.

STATEMENT OF THE CASE

On March 22, 1977, a jury found the petitioner guilty of rape, burglary and aggravated battery.

Prior to trial petitioner filed a Motion to Suppress Confession and Statements. (Vol. I, 13)[1] On November 30, 1976, a hearing was held on that motion.

On direct examination at the Suppression Hearing, Officer Lienard testified that he came in contact with the petitioner at approximately 2:50 p.m. at the corner of Main and Poplar Street. This corner was one block away from the Mount Olive Police Station. (Vol. I, Supp. H. 52) Officer Lienard told the petitioner that he and Detective Huggins would like to talk to him. Once they were at the police station, Officer Lienard contacted the State Police Headquarters and asked them to notify Detective Huggins that the petitioner was at the station. (Vol. I, Supp. H. 39)

Officer Lienard had a conversation earlier that day with Detective Huggins and Officer Elledge concerning the petitioner. Officer Lienard testified that, "they told me they wanted to talk to Darrin Boerckel and had been unsuccessful locating him. And I told them I had seen him in Mount Olive before and if I located him I would notify him." (Vol. I, Supp. H. 42) Other names were also mentioned during a discussion that Detective Huggins had with Officer Elledge. At least one or two of those people were interviewed by the police. (Vol. II, Tr. 263) The name Gary Martin was mentioned. Gary Martin lived in the same neighborhood as the victim and he had a record for rape.

[1] References to the record are made to two volumes of Excerpts from the Record which were filed by the petitioner with the Appellate Court of Illinois, Fifth District. The volume number is shown as "Vol" with the page number following. "Supp. H." before the page number refers to a page in the transcript of the Suppression Hearing. "Tr." before the page number means that it is a page from the trial proceedings.

(Vol II, Tr. 264) Petitioner lived in Litchfield, Illinois, approximately half a block from the victim. (Vol. II, Tr. 24)

Officer Lienard understood that he was not to take the petitioner into custody if he saw him. He was "just [to] determine whether or not he [the petitioner] would talk to Detective Huggins & assist him in his investigation." (Vol I, Supp. H. 42)

On cross-examination Officer Lienard was asked if he made a telephone number of any police department available to petitioner so that he could contact the police for an interview. Officer Lienard responded that, "He wanted to stay and talk to Detective Huggins, so then I didn't think it was necessary to provide him with a telephone number." (Vol. I, Supp. H. 52) When questioned if he had asked the petitioner to go down to the police station, Officer Lienard answered that he had asked. (Vol. I, Supp. H. 52)

Officer Lienard further testified that when he and the petitioner arrived at the police station, the petitioner requested to see his girlfriend at an intersection to tell her to go on to work and he asked Officer Lienard to give him a ride to where his girlfriend worked. (Vol. I, Supp. H. 43)

The petitioner did contact his girlfriend on that day. Officer Lienard testified that both he and the petitioner walked down to a corner one block from the station where the petitioner talked with his girlfriend.[2] (Vol. I, Supp. H. 56)

At the Suppression Hearing Officer Huggins testified that he arrived at the Mount Olive Police Station at approximately 3:40-3:45 p.m. (Vol. I, Supp. H. 9) He further testified that:

[2] The two volumes of Excerpts from the Record contain no testimony showing why Officer Lienard accompanied the petitioner to the corner where petitioner spoke with his girlfriend. The arrest report prepared by Officer Lienard states that the petitioner "requested that Patrolman Lienard go with him to the corner of Poplar and Maine so he could tell his girlfriend not to wait for him." (Vol I, 36)

> When I first arrived there and I told him that I was conducting an investigation, I asked him if he would talk to me and he indicated he would. I told him that he was not under arrest, that he was not being held. That he was free to go at any time. But if he would talk, I would discuss it [the investigation] with him. (Vol. I, Supp. H. 16)

Detective Huggins also advised the petitioner of his *Miranda* rights in clear language, which he read from a card, prior to any discussion on the investigation. He added that the petitioner could stop talking to him at any time and that he could demand a lawyer at any time. (Vol. I, Supp. H. 11)

After each right was read to the petitioner, he was asked if he understood it before Detective Huggins read the next one. Petitioner indicated that he understood after each particular right was read to him. (Vol. I, Supp. H. 12) It also appears that a written copy of the rights that were read to the petitioner were placed in front of him so that he could read them himself while Detective Huggins read them out loud. (Vol. I, Supp. H. 29)

The petitioner agreed to talk with Detective Huggins after the Detective finished informing him of his rights. (Vol. I, Supp. H. 11)

During the conversation that followed, the petitioner told Detective Huggins that on the evening of the rape he had walked to a filling station to purchase a coke. At that time he saw two men sitting on the victim's porch. He said he thought one of the men had a stocking cap on. (Vol. I, Supp. H. 12) Later in the conversation, Detective Huggins advised the petitioner that at the scene of the crime "there had been fingerprints on a window fan which I felt could be his" (Vol. I, Supp. H. 13) After this statement by Detective Huggins, petitioner admitted to breaking into the house, but not to commiting the rape. After Detective Huggins told him that it was not logical, both of them sat for a few minutes with no conversation until the petitioner said "I did it". (Vol. I, Supp. H. 13, 14)

Detective Huggins again advised the petitioner of his *Miranda* rights prior to filling out the written statement. (Vol. I, Supp. H. 14) The Detective wrote the statement because the petitioner said he could not read or write well. The petitioner indicated to the Detective that he wanted him to write the statement. (Vol. I, Supp. H. 14)

After the statement was written, Detective Huggins read the first page of the statement to petitioner, and petitioner indicated that he understood it and signed the page to show that he understood it. The same procedure followed for the second page of the statement. (Vol. I, Supp. H. 14) Petitioner was also advised that if there was anything he wanted to add, delete, or change in the statement when it was read to him, he could do so at that time. (Vol. I, Supp. H. 15) Detective Huggins testified that "we read through it [the statement] slowly and there was no indication by him [the petitioner] to make any alterations." (Vol. I, Supp. H. 15)

Detective Huggins testified that he and the petitioner talked for approximately an hour. (Vol. I, Supp. H. 15) During this time petitioner did not request to leave, he did not request counsel, there were no threats made against him and there was no use of physical force. (Vol. I, Supp. H. 15) Petitioner was not offered anything in return for giving the statement. Neither was he promised anything in return for the statement. (Vol. I, Supp. H. 16)

Latent prints were found at the scene of the crime, but not identifiable latent prints. The prints were not of sufficient quality to make any identification. (Vol. I, Supp. H. 31)

On direct examination, the petitioner testified that he did not tell Detective Huggins that he had seen two people on the front steps of the victim's house. (Vol. I, Supp. H. 67) Petitioner testified that he didn't tell Detective Huggins anything about the rape. (Vol. I, Supp. H. 69) He felt he could not leave at any time during the interview with Detective Huggins. (Vol. I, Supp. H. 67) As to the statement he signed, the

petitioner testified that Detective Huggins read the whole statement to him (Vol. I, Supp. H. 68) but he didn't know what he was signing. (Vol. I, Supp. H. 67)

When asked on cross-examination if anyone made him go to the Mount Olive Police Station, petitioner answered, "No." (Vol. I, Supp. H. 70)

When asked if he understood, at the time he signed it, that the statement said that he had raped the victim, petitioner responded, "Yes" (Vol. I, Supp. H. 72) When asked if he understood, at the time he signed it, that the statement could be used in court against him, petitioner responded, "No". (Vol. I, Supp. H. 78)

Petitioner also testified that he signed the statement of his own free will. No one forced him to sign and there were no threats and no promises. (Vol. I, Supp. H. 72)

When asked why he signed the statement if he didn't do it [the crimes], the petitioner responded, "I was mad". He wasn't mad at the police or the victim or his family. (Vol. I, Supp. H. 74) He was mad about a "lot of things" (Vol. I, Supp. H. 67) and he was mad at "a girl". (Vol. I, Supp. H. 75)

The trial judge denied the Motion to Suppress Confession and Statements. (Vol. I, Supp. H. 84)

The Illinois Appellate Court held that the petitioner was not under arrest prior to questioning, that he knowingly and voluntarily waived his *Miranda* rights, and that the confession which followed was voluntarily made and properly admitted into evidence.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE ILLINOIS APPELLATE COURT DECISION IS CONSISTENT WITH THE HOLDING OF *DUNAWAY* V. *NEW YORK*, ___ U.S. ___, 99 S.CT. 2248 (1979) BECAUSE THERE WAS NO FOURTH AMENDMENT VIOLATION SINCE THE PETITIONER VOLUNTARILY ACCOMPANIED OFFICER LIENARD TO THE POLICE STATION.

A person is considered "seized" under the Fourth Amendment whenever a police officer accosts him and restrains his freedom to walk away. Not all personal intercourse between policemen and citizens involve "seizures" of persons. *Terry* v. *Ohio*, 392 U.S. 1, 88 S.Ct. 1868 (1968) The petitioner herein was not seized by Officer Lienard because Officer Lienard did not restrain his freedom to walk away. Petitioner was standing on the sidewalk in the afternoon and Officer Lienard was driving by on patrol when Officer Lienard spotted the petitioner. The Officer told the petitioner that Detective Huggins of the State Police wanted to talk with him about an investigation and he asked him if he wanted to come to the police station, which was one block away, to talk with the Detective. Petitioner could have refused Officer Lienard's invitation. Officer Lienard made no show of force and he did not order the petitioner to accompany him. Neither did he tell the petitioner what the investigation was about.[3]

A person is not arrested or seized under the Fourth Amendment if he is free to choose whether to enter or continue an encounter with police and he elects to do so. *United States* v. *Brunson*, 549 F.2d 348 (5th Cir. 1977) In *United States* v.

[3] Officer Lienard was not specifically asked whether he told the petitioner what the investigation concerned, but in his testimony at the Suppression Hearing, he only mentioned reference to an investigation.

Brunson, id, the court held that Brunson was not seized when he accompanied police investigators to police headquarters so that they could talk to him about a murder investigation. Turning to the facts, the court observed that when the police accosted the defendant at his home at 9:30 p.m., they had not focused on him as a suspect, let alone obtained information sufficient to support probable cause. The investigators told Brunson that he was not under arrest, that they intended to drive him home after the interview, and they wanted his decision whether to talk to them to be voluntary. At the pre-trial Suppression Hearing, in which Brunson attempted to suppress his statement and fingerprints, Brunson contended that his initial encounter with police at his home and the journey to the police station constituted an illegal arrest under the Fourth Amendment because there was no probable cause. The appellate court concluded that Brunson had voluntarily accompanied the police to the station and that the Motion to Suppress was therefore properly denied.

Voluntary action was also found in *Cuevas-Ortega* v. *Immigration and Naturalization Service,* 558 F.2d 1274 (9th Cir. 1979) where an illegal alien willingly spoke with investigators in her home. The court noted that the illegal alien was free to close the door on the investigators. As long as she was willing to talk to them, there was no seizure of her person.

In *United States* v. *Bailey,* 447 F.2d 735 (5th Cir 1971) the police asked Bailey to accompany them to the police station. There was no physical contact and there was no conversation between Bailey and the police during the ride to the station. The court held that the police action did not constitute an arrest because Bailey had voluntarily accompanied the officers to the station.

Although the facts in the foregoing cases and the facts in the present case are not identical, a comparison does show that when the petitioner accepted Officer Lienard's invitation to

accompany him to the station, when refusal was an option available to him, petitioner's choice was voluntary and Officer Lienard's action did not constitute a Fourth Amendment seizure.

The import of other facts which occurred after the petitioner's initial voluntary action is not clear due to the sparsity of testimony in the Record Excerpts concerning them. Petitioner's testimony that he was searched at the station is not contradicted by either of the officers, yet neither were any questions pertaining to a search put to the officers. As to the fact that Officer Lienard walked with the petitioner to the corner to speak with the petitioner's girlfriend, there is no testimony in the Record Excerpts explaining why the officer did this. The Arrest Report that was prepared by Officer Lienard after the petitioner confessed and was arrested, states that the petitioner asked Officer Lienard to accompany him.

II.

THE ILLINOIS APPELLATE COURT DECISION IS CONSISTENT WITH THE HOLDING OF *DUNAWAY* V. *NEW YORK,* ___ U.S. ___, 99 S.CT. 2248 (1979) BECAUSE IF THERE WAS AN ILLEGAL SEIZURE, THE SUBSEQUENT CONFESSION WAS SUFFICIENTLY ATTENUATED FROM IT SO AS TO DISSIPATE THE TAINT.

The exclusionary rule has no application when the connection between the arrest[4] and the confession has become so attenuated as to dissipate the taint. *Wong Sun* v. *United States,* 371 U.S. 471, 83 S.Ct. 407 (1963) In *Wong Sun,* the illegal custody of Wong Sun was terminated because Wong Sun had been released on his own recognizance after a lawful arraignment. He returned voluntarily several days later to make a

[4] Whether a detention is called a "seizure" or an "arrest" is not significant for Fourth Amendment scrutiny. See *Terry* v. *Ohio, supra.*

statement. Under those circumstances, the Court held that the connection between the arrest and the statement had become so attenuated as to dissipate the taint of the unlawful arrest.

The attenuation exception to the exclusionary rule that was applied in *Wong Sun, id* was clarified in *Brown* v. *Illinois,* 422 U.S. 590, 95 S.Ct. 2254 (1975) In *Brown* this Court determined that:

> the question whether a confession is the product of a free will under *Wong Sun* must be answered on the facts of each case. No single fact is dispositive . . . The *Miranda* warnings are an important factor, to be sure, in determining whether the confession is obtained by exploitation of an illegal arrest. But they are not the only factors. The temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and particularly, the purpose and flagrancy of the official misconduct are all relevant . . . the voluntariness of the statement is a threshold requirement.

422 U.S. at 603, 604, 95 S. Ct. 2261, 2262.

In light of the foregoing criteria, this Court found no attenuation in *Brown.* There was also no attenuation in *Dunaway* v. *New York,* ____ U.S. ____, 99 S.Ct. 2248 (1979) a case described by this Court as being "virtually a replica of the situation in *Brown*". 99 S.Ct. at 2259

This case is distinguishable from *Brown* and *Dunaway* because petitioner's confession was sufficiently attenuated from the alleged illegal seizure so that his confession was the product of his own free will.

Applying the *Brown* criteria to the facts of this case, the conclusion follows that the threshold question of voluntariness is easily satisfied. Petitioner was read his *Miranda* rights slowly and in simple terms prior to any discussion on the investigation and once again, prior to the preparation of the written statement. The fact that a person is advised of his *Miranda* rights is a significant factor in considering the voluntariness of statements later made. *Davis* v. *North Carolina,* 384 U.S. 737, 86 S.Ct. 1761 (1966)

The Record Excerpts also show that there were no coercive influences leading the petitioner to confess. He was not threatened or promised anything and he was not placed in an interrogation room. Petitioner sat in the main office area while waiting for Detective Huggins. He was not subjected to intense questioning, rather he discussed what he knew about the crime with Detective Huggins. The conversation with Detective Huggins, including the time that it took to write the confession, lasted for approximately one hour.

During the conversation the petitioner first told Detective Huggins that he had seen two men, one wearing a stocking cap, on the porch of the victim's home when he went out for a coke on the evening of the crime. The petitioner lived only one-half a block away from the victim. From this, it would be logical and reasonable for Detective Huggins to continue the conversation in the hope that the petitioner would recall more details of what he saw.

Officer Huggins recalled that "I advised Darrin that at the scene there had been entry gained and in doing so there had been fingerprints on a window which I felt could be his . . . Darrin admitted breaking into the house; but he did not admit to the rape . . . " (Vol I, Supp. H. 12)

Within the context of the conversation, this statement by Officer Huggins did not bend the free will of the petitioner. If the petitioner was innocent, even with relatively low intelligence, he would know that Officer Huggins was mistaken about the fingerprints.

An analogous Fifth Amendment situation was encountered in *Oregon* v. *Mathiason,* 429 U.S. 492, 97 S.Ct. 711 (1977). There, the defendant's parole officer falsely told the defendant that his fingerprints had been found at a burglary scene and

then the defendant confessed. This Court disregarded the probation officer's false statement in holding that the parolee had not been in custody or otherwise deprived of his freedom of action in any significant way so as to require the interrogating officer to give Miranda warnings. Since the petitioner was not subject to seizure at the time that officer Higgins made his fingerprint statement, even if the petitioner had been initially illegally seized, the same significance should be attached to the false information in this case.

Two of the other three factors in *Brown,* which can show alteration of taint, are also satisfied in this case. Although there were only approximately two hours between the time that the petitioner arrived at the station and the time the confession was completed, the temporal proximity of the arrest and the confession is the vaguest and least determinative factor involved. 13 Houston L. Rev. 753, 764 (1976).

The presence of intervening circumstances, on the other hand, is a factor that is found here. It is the respondent's position that Detective Huggins' clear and simple statement to the petitioner, which he made when he first arrived at the station and prior to any discussion, was a full clarification to the petitioner of his free status which should have been reasonably understood even by an individual who could not read or write well. Officer Huggins told the petitioner that:

> he was not under arrest, that he was not being held. That he was free to go at any time. But if he would talk, I would discuss it [the investigation] with him.

Vol. I, Supp. H. 16.

If the petitioner thought that he was under arrest or otherwise being detained against his will due to his perception of Officer Lienard's actions, Detective Huggins' statement left no room for interpretation. The petitioner was free to go. Instead, the petitioner elected to stay and talk with the Detective. This choice by the petitioner is similar to Wong Sun's

decision to return to the police station and confess in *Wong Sun* v. *United States, supra.* Both the petitioner herein and Wong Sun spoke with the police when they were under no obligation to do so.

The final and most significant factor outlined in *Brown,* which is to be considered in determining whether a confession is obtained by the exploitation of an illegal arrest, is the purpose and flagrancy of the official misconduct. In this case, the Record Excerpts reveal that the police only wanted to talk to the petitioner to see if he had any information about the crime. Since he lived only one-half block from the victim, he could have seen something to aid their investigation. One or two other people were also interviewed at different times with regard to the crime, including someone who lived in the victim's neighborhood and who had a rape record.

While on patrol, Officer Lienard happened to spot the petitioner on the street, and he took that opportunity to ask the petitioner if he wanted to accompany him to the police station, which was only one block away, so that Detective Huggins could speak with him. Officer Lienard was under the impression that the petitioner voluntarily accepted his invitation.

These facts do not show a flagrant violation of the Fourth Amendment. By contrast, in *Brown* the petitioner was arrested forcibly by surprise at his home. And in *Dunaway* the petitioner was picked up at a neighbor's house and although he was not told that he was under arrest, he would have been physically restrained if he attempted to leave. In comparison with *Brown* and *Dunaway,* the alleged detention of the petitioner herein was relatively nonintrusive on his personal privacy. Where a Fourth Amendment violation is less flagrant, a lesser showing is required to purge a statement of taint. *United States* v. *O'Looney,* 544 F.2d 385 (9th Cir. 1976) *cert den.* 429 U.S. 1023, 97 S. Ct. 642 (1976).

CONCLUSION

For the foregoing reasons, the Respondent prays that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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